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Supreme Court of the United States.

October Term, 1956.

No. 86.

JAMES P. MITCHELL, Secretary of Labor, United States Department of Labor,
Petitioner,

v.

BRANDTJEN & KLUGE, INCORPORATED,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

Opinions Below.

The opinion of the District Court (R. 81-86) is reported at 129 F. Supp. 675. The opinion of the Court of Appeals (App. to petition, pp. 22-36) is reported at 228 F. (2d) 291.

Jurisdiction.

The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254 (1).

Questions Presented.

1. Should this Court entertain this petition, which seeks to graft onto section 7(e) of the Fair Labor Standards Act, which was added by the amendments of 1949, an additional requirement or test which has no foundation in decision, statute or industry, and which has been repeatedly repudiated by this Court in decisions beginning with the *Belo* case (*Walling* v. *A. H. Belo Corp.*, 316 U.S. 624)?

2. Should this Court review the findings of fact based on stipulated facts, and the decisions of both lower courts to the effect that the respondent's contracts of employment comply in every respect with the law enunciated in decisions of this Court prior to the enactment of section 7(e) of the Fair Labor Standards Act and also comply in every respect with the provisions of law set forth in the said new section 7(e), where the petitioner admits in his petition, pages 19 and 20, that there is no conflict between the decision of the United States Court of Appeals for the First Circuit in this case and the (then) only other existing decision of another Circuit of the Courts of Appeals, and where this Court has already recently unanimously denied a petition for certiorari on the substantially identical contention in *Tobin* v. *Little Rock Packing Co.*, 202 F. (2d) 234; cert. den. 346 U.S. 832?

Statement of the Case.

This was an action for an injunction by the Secretary of Labor under the provisions of the Fair Labor Standards Act of 1938 as amended (Act of June 25, 1938, c. 676, 52 Stat. 1060, 29 U.S.C. sec. 201 *et seq.*), hereinafter called the Act, against the respondent corporation for alleged violations of overtime payment requirements as set forth in

section 7 and section 15(a)(2) of said Act. The respondent in its answer denies said allegations and maintains that at all times in the past and at the present time it has been acting and is presently acting in full compliance with the provisions of that Act.

The parties have agreed on a stipulation of facts in this case, which includes as exhibits a sample employment contract and summary of the weeks worked by the employees involved and some of the petitioner's records relating to the respondent showing the hours worked by each of the respondent's employees involved in this case (R. 9).

The respondent, a small Minnesota corporation, having a total employment of less than seventy-five employees at the commencement of this action, is engaged in the manufacture, in St. Paul of that state, of printing presses, and maintains branch offices throughout the United States in eleven states and ten cities, including the City of Boston in the Commonwealth of Massachusetts, for the distribution, sale and installation of these printing presses. The respondent is engaged in interstate commerce and during the period complained of employed from eight to seventeen "erectors." The general duties of these erectors consist of installation, service and repair of printing presses in the general area to which they are assigned. The hours worked by said erectors vary from week to week and from erector to erector, due to the irregularity of demand for their services. Each of these erectors was employed under a separate written signed contract. The provisions of the contracts are uniform except that the compensation provided varies as to the basic stated hourly rate and therefore as to the stated guaranties, depending upon the experience, skill, longevity and other qualities of the individual erectors. These contracts specified that the erector was to be paid at a basic hourly rate in all cases in excess of the minimum under section 6 of the Act for the first

forty hours each week, with not less than one and one-half times such rate for each additional hour over forty hours. Moreover, the erector was guaranteed each week a designated weekly amount equivalent to forty-eight hours, with overtime for hours over forty computed therein, that is, forty hours at the regular rate for straight time plus eight hours of overtime at one and one-half times the regular rate. The erectors are paid bi-weekly by means of checks issued by the respondent from its home office. Fourteen of the seventeen erectors, during the period up to September 6, 1953, embraced in the petitioner's bill of complaint, exceeded the maximum guaranteed hours. In every case in which the erector was given an increase in pay, both the hourly rate and the guaranty were raised proportionately and a new contract was issued. When an employee worked in excess of the weekly guaranty, he was compensated at one and one-half times the specified rate for hours in excess of the guaranty on each occasion.

At the outset the respondent submits that it has had some difficulty in determining what the petitioner contends is the violation or violations alleged. The complaint is in general terms. Examination of the Fair Labor Standards Act and its amendments and a study of all the decided cases involving the kind of contract involved in this case reveal no basis in logic, statute or any decision for contending that there is a violation here. On the other hand, even a cursory perusal of the decided cases in which a *Belo*-type plan was invalidated discloses in them violations on the face of the contract, or in the mathematics involved, or a failure to keep records of hours worked, or an alternative arrangement. In the case at bar, as appears from the docket entries (pp. 1, 2, 3, of the Record), proceedings were commenced in Massachusetts, far removed from Minnesota, where the respondent had its factory, practically all its employees, all its offices and records, and its experi-

enced and capable labor counsel. This hardship on the respondent was met by the proposal that the most flagrant violation was in Boston, yet the erector stationed in Boston for the New England area did not appear at the trial nor did any other employee of the respondent's. In the succession of briefs filed in the lower courts in this case the petitioner first took the position that the violation was lack of irregularity in the respondent employees' employment, that there was some hidden control of the hours by the employer. When exhaustive investigation by the petitioner failed to produce anything to prove that irregularity was lacking and when the respondent's briefs disposed of this contention by showing the irregularity inherent in the kind of work performed, this basis for the alleged violation was no longer argued by the petitioner.

Next the petitioner in his lower court briefs attempted to argue that the courts in the cases decided after the *Belo* case (*Walling* v. *A. H. Belo Corp.*, 316 U.S. 624) refused to follow it or apply it; and the petitioner thereupon discussed at great length the cases of *Walling* v. *Helmerich & Payne, Inc.*, 323 U.S. 37; *Walling* v. *Youngerman-Reynolds Hardwood Co., Inc.*, 325 U.S. 419; *Walling* v. *Harnischfeger Corp.*, 325 U.S. 427; *149 Madison Avenue Corp.* v. *Asselta*, 331 U.S. 199; and *Bay Ridge Operating Co., Inc.*, v. *Aaron*, 334 U.S. 446; stating that they were authorities to sustain the petitioner's contention of a violation by this respondent. It was necessary for the respondent to discuss these cases at great length in its earlier briefs to show that they had no similarity to the situation involved in the *Belo* case. This earlier basis of the petitioner's claim was not even mentioned in the Circuit Court of Appeals except that the cases cited *supra* were relegated to a footnote.

Next the petitioner contended in his earlier briefs that the *Belo* and *Halliburton* cases (*Walling* v. *A. H. Belo*

Corp., 316 U.S. 624; *Walling* v. *Halliburton Oil Well Cementing Co.*, 331 U.S. 17) were the authority for the proposition that the *Belo* plan was available only when the employees worked beyond the guaranty a substantial number of times. When the respondent in its analysis of the facts in these two cases and its quotation of the actual language in the decisions in these two cases made it apparent to the lower court that factually this contention was not true, this contention of the petitioner likewise did not appear in the Circuit Court of Appeals.

Finally, the petitioner in the lower court seized upon the *Roig* case in the First Circuit (*McComb* v. *Roig*, 181 F. (2d) 726) as authority for the proposition that the test of compliance with the provisions of an acceptable *Belo* plan or with the provisions of the Fair Labor Standards Act was whether the guaranty was exceeded a substantial number of times by the employees. Again, by studying the decision in the *Roig* case and by setting forth the actual facts, and by quoting the language used in the decision, the respondent was able to reveal the misconception of the *Roig* decision urged by the petitioner and to expose the false emphasis placed on certain phrases taken out of context from the decision.

Chief Justice Sweeney's well-reasoned opinion in the District Court (R. 81-87) indicated that he clearly understood and correctly applied the logic of the *Roig* decision. Finally in the Circuit Court the petitioner threw overboard all his contentions and all his citations except the claim that the respondent had violated the Act because not enough of the respondent's employees had exceeded the guaranty enough times, thereby attempting to set up as an absolute prerequisite for compliance with the provisions of the Act a test which has no foundation in industry, statute or decision. The only citation the petitioner used for this administrative yardstick that the petitioner was seeking to

graft on the Act was the *Roig* case. If the purpose in bringing this case in a jurisdiction almost half-way across this continent from the respondent's headquarters was to come into the Court of Appeals where the *Roig* case was decided, the strategy backfired as predicted by the respondent, because within the framework of the facts of the *Roig* case and the principles and tests enunciated in that decision lay the ratification and validation of the respondent's position.

The petitioner, however, could not have been guided by the *Roig* decision in originally bringing this action, because the hard core, the true logical gist of the *Roig* decision, does not support the petitioner's basis for alleging a violation here. At no time did the petitioner make any mention of the fundamental principle or test set up by the *Roig* decision. Instead, the plaintiff attempted to distort a mentioned circumstance in the *Roig* case, and said it was the controlling test enunciated in that decision. In order to show that the petitioner had no foundation for seeking to set up as an absolute prerequisite for compliance with the provisions of the Act the notion that so many employees must exceed the guaranty so many times, it was necessary to go back over the Act, beginning with its original enactment, and consider the decided cases. They showed what the problems involved were, what was intended to be done to correct them, what the courts have decided concerning the Act, and made clear that language attempted to be used by the petitioner to prove his proposition was, when put back in its proper setting, part of a sound decision in each of the cases to be cited hereafter in this brief, including the *Roig* decision, and that all these decisions, without exception, sustained the respondent's contention of full compliance with the Act, and none of them supported the use of the respondent's proposed test of after-the-event pouncing on a business if it did not happen to do x amount of business in y place during z period of time.

Petitioner alleges that respondent is acting in violation of section 7 of the Act. The section reads as follows:

> "SEC. 7. (a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

Petitioner's allegations arise out of the fact that the respondent corporation employs its erectors under employment contracts of the type commonly known as "*Belo*" contracts. This type of contract has statutory approval. To be valid these contracts must meet with certain requirements which are set out in section 7(e) of the Act. Section 7(e) reads as follows:

> "(e) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of forty hours if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of such employee necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate provided in section 6 (a) and compensation at not less than one and one-half times such rate for all hours worked in excess of forty in any workweek, and (2) provides a weekly guaranty of pay for not more than sixty hours based on the rates so specified."

Respondent submits that its employment contracts are in conformity with the provisions of the above section. Each contract specifies that the employee is to receive an hourly rate which in every instance is in excess of the minimum 75 cents per hour prescribed by law on the first forty hours in any workweek, and for time over forty hours each week the employee is to receive for each hour of work not less than one and one-half times such basic hourly rate. In addition, the contracts provide the employee with a guaranteed amount of pay for all hours worked up to and including forty-eight hours of work per week.

Respondent predicates its assertion of conformity with the Act on the provisions of section 7(e). Respondent believes that the main purpose of section 7 is to provide for payment of overtime on all hours worked over the basic number of hours. In addition to this, however, it also stipulates how it shall be paid, that is, at not less than one and one-half times the regular rate. "Regular rate" is understood to include "all remuneration for employment paid to or on behalf of the employee" (section 7(d)), with certain exceptions. It is understood by the respondent that by virtue of section 7(e) an employer may pay an employee at a *specified rate* to be designated as the regular rate called for in section 7(a) provided the employer and the employee agree contractually that the specified rate is to be the regular rate. Respondent realizes that, in order for an employer to avail himself of this exception, (1) there must be a bona-fide contract with the employee; (2) the contract must specify a regular rate of pay not less than the minimum hourly rate called for in section 6(a); (3) the contract must specify compensation at not less than one and one-half times such rate for all hours in excess of forty in any workweek; (4) the duties of the employee must necessitate irregular hours of work; and (5) the contract must provide a guaranty of pay for not more than sixty hours based on

the rates specified. Respondent contends that its contracts meet every specification of section 7(e), and therefore there can be no question of violation of the Act as petitioner alleges.

Argument.

None of the usual reasons for granting a writ of certiorari obtains in this case. There is no dispute on the facts. The decision of the District Court (R. 81-87) tested the contracts in question from all angles, in form, in substance, in actual practice, under the cases decided before the 1949 amendment and under the Fair Labor Standards Act as it now exists, and found full compliance. The decision of the Circuit Court of Appeals approached the problem from a different point of view, examined the new section 7(e) carefully, its wording, its history, scrutinized the operation of the employment contract in the field, and came to the conclusion that no basis for a violation existed.

Here there is no conflict among the various Circuits of the Courts of Appeals, but rather unanimity of interpretation and application.

Here, too, is the same old contention first urged in the *Belo* case, and disposed of by the *Belo* decision of this Court, now resurrected before this Court which only recently unanimously denied certiorari on the same contention in *Tobin* v. *Little Rock Packing Co.*, 202 F. (2d) 234; cert. den. 346 U.S. 832.

1. In this petition for certiorari before the Court the petitioner's sole contention seems to be that the decision below is a "flat repudiation," a "sweeping repudiation," of all the decisions of this Court prior to the 1949 amend-

ments; that the decision below holds that the new section 7(e) was intended by Congress to be "a sweeping repudiation of all this Court's other decisions construing the overtime requirements of the Act" (Petition, p. 18).

The best answer to this distortion of the decision below is the reading of the decision itself (Appendix to Petition). In the decision the *Belo* case is carefully analyzed, the cases decided after it are patiently discussed, the Congressional background of the 1949 amendments to the Act is surveyed, the decisions since the 1949 amendments are cited, and when all the facts and operations of the respondent's employment contracts are tested against these standards, no violation or any basis for suspecting a violation is found to exist.

Respondent contends that its wage plan in the case at bar need only be measured against the statute to determine its validity. It is generally conceded that the section of the Act with which we are concerned is a codification of the *Belo* decision. *Walling* v. *A. H. Belo Corp.*, 316 U.S. 624. Respondent, subsequently to the enactment of the 1949 legislation, entered into employment agreements with the erectors in good faith, and these contracts were established in strict conformity with the provisions of section 7(e) of the Act as amended. The facts in the case at bar are substantially similar to those that were before this Court in the *Belo* case, and therefore are to be measured against the doctrine handed down in that decision as it now appears under section 7(e) of the Act as amended.

In the *Belo* case, decided in 1942, this Court approved an employment agreement almost identical to the case at bar, where the employees received a basic stated hourly rate and a guaranteed weekly wage based on that hourly rate for the statutory maximum, and not less than one and

one-half times that hourly rate for hours beyond the statutory maximum. In the *Belo* case, as in the case at bar, the employees, because of the nature of the work, worked irregular hours. The Administrator of the Wage and Hours Division objected that such an arrangement was "artificial." This Court overruled that contention and held that such an arrangement was the only means available to industry for securing a steady income to employees with irregular hours, and that to follow the formula suggested by the Administrator that the "regular rate" be determined by dividing the weekly guaranty by the number of hours worked each week would not be regular (since the weekly hours varied so much), either in the mathematical sense or in the sense that neither the employer nor the employee would know what it was in advance.

Petitioner's contention (Petition, p. 10) that the decision below is a repudiation of the cases of *Walling* v. *Youngerman-Reynolds Hardwood Co., Inc.*, 325 U.S. 419, *Walling* v. *Harnischfeger Corp.*, 325 U.S. 427, *Walling* v. *Helmerich & Payne, Inc.*, 323 U.S. 37, *149 Madison Avenue Corp.* v. *Asselta*, 331 U.S. 199, and *Bay Ridge Operating Co., Inc.*, v. *Aaron*, 334 U.S. 446, reh. den., 335 U.S. 838, is not borne out by the decision itself. Most of them are not even mentioned in the decision. These cases are wholly dissimilar to the case at bar and also unlike the *Belo* case itself. In all of them the employment contract itself was not like the one in the case at bar, or its actual operation was different.

The *Youngerman-Reynolds* and *Harnischfeger* cases involved piece-rate wage plans; the *Bay Ridge* and *Helmerich & Payne* cases involved split pay plans. *149 Madison Avenue Corp.* v. *Asselta* concerned a formula plan which, in fact, was not followed by the parties.

In 1947, five years after the *Belo* case, this Court, in *Walling* v. *Halliburton Oil Well Cementing Co.*, 331 U.S. 17, approved a contract identical with those in the *Belo* case

except for the amount of the hourly rates and the fixed guaranty.

Bay Ridge Operating Co., Inc., v. *Aaron*, 334 U.S. 446, it is generally agreed, was the decision which dramatically focussed attention on the overtime problems of the Act and precipitated a movement on the part of Congress to amend and clarify the Act. The result was the inclusion in the Act of section 7(e), which took wage payment contracts outside the scope of the *Missel* doctrine (*Overnight Motor Transportation Co., Inc.*, v. *Missel*, 316 U.S. 572) by stating clearly and concisely the requirements necessary for a valid wage plan in which the employer and employee contract what the "regular rate" shall be.

A mere reading of section 7(e) indicates that the employment contracts in the case at bar comply with that section's requirements.

The contention of the petitioner here seems to be, repeated over and over again, that the mere formal contract terms are not enough to satisfy a valid *Belo*-type contract; that its operation must be considered. With that the respondent does not disagree. For it is in the carrying out, the implementing, of the written employment contracts in the case at bar that the integrity, the honesty, the bona-fide quality of the respondent's wage agreements are verified. Not one single instance is stated in the petitioner's argument where the employment contract was not followed by the respondent during the three years covered by the complaint in this case. It is this fact which distinguishes the case at bar from the cases cited earlier where this Court held the wage plan invalid.

In the case at bar the guaranty is based on the hourly rate stated; the relation between the guaranty and the hourly rate is not "fictitious"; rather it is mathematically accurate in each contract. Each contract is signed by the employee involved. No employee has ever complained. No

instance exists where any of the employees involved was ever paid on any other basis. In every single instance when there was any change in the hourly rate or the guaranty a new contract was signed and the same valid relation maintained between the two figures. In each instance that an employee worked beyond the forty-eight hours upon which the guaranty was based he received the correct amount of additional compensation on the basis of one and one-half times his stated hourly rate.

And this exceeding of the guaranty—although it is neither required by the *Belo* decision nor by the provisions of section 7(e), but desired by the petitioner so that it can see if the stated hourly rate is really being used or is only "fictitious"—fortunately occurred in the case at bar, for fourteen of the seventeen employees involved (or 82% of the employees involved) actually worked beyond the forty-eight hours upon which the guaranty was based, and received the correct additional compensation (R. 11, 12). And this exceeding of the guaranteed hours varied among the employees from one-week instances to a sixteen-week instance (R. 11, 12).

This verification of the stated hourly rate in the type of employment contract used by the respondent qualifies the rate as a true "regular rate" under the test advanced by the petitioner.

Another test proposed by the petitioner, although it is now submerged in footnotes (Petition, p. 9, footnote 3; Petition, p. 15, footnote 6), is that for a valid *Belo*-type contract the guaranty must be exceeded frequently. The fact is that nowhere in the *Belo* decision does it appear that the guaranty was exceeded frequently, but only that, as in the case at bar, when it was exceeded, the employee was paid at the hourly rate for the statutory maximum and at least one and one-half times that rate for each hour over the statutory maximum (316 U.S. at 631-632).

Scattered through the petition are references to and figures on percentages in regard to the workweek of the various respondent's employees, yet now in this Court the petitioner does not seem to set forth his customary standard claim that the guaranty must be based on the usual or actual workweek. The fundamental answer to this contention is that the *Belo*-type employment agreement was approved in the *Belo* and *Halliburton* cases, and now in section 7(e), to cover cases where the employment is necessarily irregular, where the hours worked vary from week to week, where in fact there is no usual workweek. That is the *raison d'etre* for the *Belo*-type employment agreement.

But it is not necessary to substitute forecasts of writers and bulletins of Chambers of Commerce as to what section 7(e) means or how it would be applied, as the petitioner has done. Section 7(e) has already been construed and applied in several decisions.

Tobin v. *Little Rock Packing Co.*, 202 F. (2d) 234, has already been referred to in this brief. It was the latest Court of Appeals decision existing prior to the decision below and the first one decided under the new statute. The facts relating to the *Belo*-type agreement and the operation of it in that case were weaker than in the present case; the guaranty had never been exceeded; the plan was upheld and certiorari was unanimously denied in 346 U.S. 832. Incidentally, the petition in that case carries practically the same contentions and citations that are used in the petition in the case at bar.

The decision in the case at bar in the Circuit Court likewise is available to this Court. It has already been followed in the Court of Appeals for the Fifth Circuit. *Mitchell* v. *Ralph Adams d/b/a Macon Shirt Co.*, 230 F. (2d) 527. It has also been followed in the Court of Appeals for the Second Circuit (*Mitchell* v. *Hartford Steam Boiler Inspec-*

tion & Insurance Co., Docket No. 23,739, decided July 20, 1956).

There is plenty of warrant in the legislative history of section 7(e) for the inference that Congress intended to give specific legislative approval to *Belo*-type contracts, to set forth their requirements, and to make sure that the functioning of such useful employment contracts would not be fouled up by impractical, unrealistic rulings or interpretations of the Administrator of the Wages and Hours Division. There is nothing new in this petition that the petitioner has not been saying since the *Belo* case itself. That the petitioner's long continued position is one of open hostility to all *Belo*-type contracts is a matter of record (see Interpretative Bulletin No. 4, Wages and Hours Division; *Walling* v. *A. H. Belo Corp.*, 316 U.S. 624; *Walling* v. *Halliburton Oil Well Cementing Co.*, 331 U.S. 17).

That the petitioner's attitude had not changed as recently as 1949 is plainly shown by the remarks of the Administrator of the Wages and Hours Division before a House Hearing on amendments of 1949 condemning all *Belo*-type contracts as such and advising against their encouragement (U.S. Fair Labor Standards Act, House Hearings, 1949, pp. 55, 56).

The Lesinski bill, first one proposing the 1949 amendment, authorized the Secretary of Labor to issue regulations setting forth conditions under which these contracts could be used and how they were to work. This bill was rejected by Congress for that very reason, based on the history of the attitude of the Department of Labor toward *Belo*-type contracts, and instead no rule-making power was given to the Secretary of Labor as to section 7(e). Instead, Congress set forth in the law the requirements for a *Belo*-type contract. See 95 Cong. Rec. pp. 11000, 11001; 95 Cong. Rec. pp. A5230-5233; 95 Cong. Rec. pp. A5475, 5476.

A recent decision brings the picture up to date. In *Mitchell* v. *Adams*, 129 F. Supp. 377 (M.D. Ga., Macon Div., opinion dated March 3, 1955), the Court said (p. 387):

> "In view of the widespread publicity given to the Supreme Court's decisions in the Belo and Halliburton cases, and in view of the specific contention of the Administrator in those cases to the effect that the number of hours guaranteed bore no relation to the usual work week, if it had been the intention of Congress that the validity of such contracts should depend upon whether or not the hours worked should to a certain extent or with a certain frequency exceed the number of hours guaranteed, it would have been appropriate for Congress to have said so."

Upon appeal the citation for this case is *Mitchell* v. *Ralph Adams d/b/a Macon Shirt Co.*, 230 F. (2d) 527.

2. The importance of the issue in this case, however obscure it may be, as framed by the petitioner, is, as the petitioner says (Petition, p. 18), attested by the numerous previous decisions of this Court construing the term "regular rate." The very fact that these decisions already exist, and that Congress obviously utilized them in drafting the 1949 amendments to the Act, constitutes the clearest proof that the issue is no longer important, is no longer new or unexplored, and is the best argument for denying this petition.

An erector with six or seven states to cover may work eight hours one week, seventy-five the next. How many hours he will work no one can predict. It will depend on how many printing presses are sold in his territory and need to be installed; how many will break down and need

repairing, and this will depend on how much business the owner of the printing press is doing at the time in question.

Hence came *Belo*-type employment contracts. That is why this Court approved them and Congress authorized them. They have a function in American business life. And when a *Belo*-type contract, either in its set-up or in its operation, is "fictitious" or "artificial," the violation will be apparent, as even any novice who has read the various decisions in this field soon discovers.

A contract is a legal agreement. What the petitioner loses sight of and what, fortunately for employers and employees, the courts and Congress realize, is that, in addition to the employment agreement being legal, which this one is, it must be agreed to by employers and employees. The fact that it works is significant, as stated in the *Belo* decision; this is more important to the American economy than some rule-of-thumb test for ease of clerical administration by the Department of Labor.

3. The petitioner (Petition, pp. 19, 20) admits there is no conflict between the decision below and the decisions of other Circuits of the Courts of Appeals.

4. The mention in the petition (p. 5) that "The contract includes the further qualification that the weekly guarantee 'is subject to adjustments for vacations, absences, and any other conditions not within the control of the company' (R. 14)" has not been expanded or argued.

If the petitioner feels that it is a harmful qualification, or in any way violates the Act, the petitioner is misinterpreting it. This sentence in the contract has never been used, and the respondent in open court in the hearing before the United States Court of Appeals for the First Circuit stated, and repeats here, that, if the petitioner wished

this sentence deleted from the respondent's employment contracts, a letter to the respondent from the petitioner, requesting it, would accomplish that result.

Conclusion.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

BADGER, PRATT, DOYLE & BADGER,
DAVID W. KELLEY,
PETER D. COLE,
PAUL R. FREDERICK,
53 State Street,
Boston 9, Massachusetts,

FELHABER & LARSON,
E-1407 First National Bank Building,
Saint Paul 1, Minnesota,
Attorneys for Respondent.